

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment:)	WC Docket No.11-59
)	
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

LEGAL COMMENTS OF MIDDLETOWN TOWNSHIP, PA

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AND NOW COMES Middletown Township (Bucks County),
Pennsylvania by and through its attorney Frederick A. Polner, Esq. and hereby
files this its COMMENTS in the above captioned matter.

Summary

As explained in these comments, Middletown Township (Bucks County), Pa. (herein “Middletown” or the “Township”) has enacted local legislation which quickly allows broadband providers to use its rights of way and, at the same time, does so in a fiscally responsible manner which helps to protect the public’s safety

and helps the Township to sustain its provision of vital first responder and other essential services to the public.

These Comments suggest how the public interest can best be served by allowing the Township to manage its own rights of way in a manner unfettered by the federal government and explain how this position is well founded by federal and state law.

Middletown Township Budget Pressures

As with many local governments around the country, Middletown finds itself in difficult times. As the national economy, the state economy, and the local economy languish, the Township finds it increasingly difficult to enact a balanced budget. All sources of revenue to the Township have become even more important.

The Township government employs its own fulltime police department and provides the vast majority of funding for a volunteer corps of firefighters and emergency medical responders which protect the life, limb, and property of persons located in the Township. The Township is working mightily to avoid having to lay off its police officers and to avoid depriving its first responders of the resources they need to protect Township residents.

Middletown Township – Existing Before the Constitution

Middletown is located roughly 20 miles north of Philadelphia with a 2010 population of about 45,000 people and a land mass of about 20 square miles.

Middletown Township predates the founding of the United States by almost 100 years. The Township was created in 1692. Other townships and boroughs in Pennsylvania also were created about that same time. This is important from a legal point of view as more fully explained below in these Comments in the Township's discussion of the Tenth Amendment.

From the time of William Penn¹, land use and the regulation of streets were matters of local law in Pennsylvania. When William Penn granted land to the early colonists, provisions were made for roads. A statute in 1699 gave the Governor and Council the authority to lay out public roads. County courts were directed to provide local access roads or what then were called "cartways." The Governor appointed men to pave, clear or repair streets, which work was to be paid for by a charge assessed on adjoining landowners. Colonial townships then were established, the supervisors of which were appointed to build and maintain the roads. Therefore, it is no surprise that over a century ago the Pennsylvania Supreme Court held that "The streets and alleys of cities, towns and boroughs are under the control and direction of these municipalities, and they have all the power over them that can lawfully exist."

In 1762, the Colonial legislature recognized that the prior practice of calling residents out as necessary to work on the roads needed to be modernized.

¹ In 1681, King Charles II of England signed the Charter of Pennsylvania granting to William Penn the portion of the land between Lord Baltimore's province of Maryland and the Duke of York's province of New York. The King named the new colony in honor of William Penn's father.

Consequently, it enacted The Highway Act of 1762. This allowed for the election of Supervisors of the Highways in each township. These Supervisors were given the responsibility of hiring workers and buying materials for clearing, amending and repairing the public roads. To be fiscally responsible, in order to pay for these responsibilities, the Supervisors were given the power to levy taxes to pay for the maintenance of the roads. These same responsibilities are found, today, in Pennsylvania's Second Class Township Code, the organic law governing Middletown Township.

Management of Rights of Way

Middletown Township treats very seriously its obligation to properly manage its rights of way for the benefit of its residents.

Proper management of the rights of way includes the rapid deployment of broadband. That is why (as explained in these Comments) the Township's Rights of Way Management Ordinance provides a streamlined process which allows broadband providers to use and occupy the Township's rights of way without the necessity of negotiating individual agreements.

But, in addition, proper management of the Township's rights of way includes both the *physical* management of the rights of way *and* the *fiscal* management of the rights of way.

In Pennsylvania, a township holds rights in its public ways as a fiduciary for the benefit of its residents.

This fiduciary obligation to manage the public rights of way in the best interests of its residents encompasses not only the *physical* management of its rights of way, but extends to the *fiscal* management of those rights of way, as well.

It has long been the law in Pennsylvania that a municipality is obligated to *physically* manage its right of way. In a nutshell, a municipality in Pennsylvania has the duty to keep its streets clear of obstructions which are both dangerous and unnecessary and which can be avoided with reasonable care. This is especially so as it pertains to wires, poles, and other obstructions which impair safety and inconvenience the public use of the rights of way.

Importantly, it also has long been the law in Pennsylvania that a municipality has a fiduciary duty to *fiscally* manage its rights of way, as well.

In Pennsylvania, a municipality's use of a street is not restricted to the public's "right of passage". That is to say, a municipality is entitled to make any additional use of the property consistent with its character as a public street, so long as the additional use constitutes no additional burden upon abutting property owners.

For example, over 30 years ago, a federal district court sitting in Pennsylvania was called upon to examine a franchise fee imposed by a city in exchange for use of its streets for a cable television system. There, the court observed,

Surely, it would be unreasonable to require a city to provide public property at a nominal rental fee to a business which intends to

directly utilize this land for the realization of profits. The mere happenstance that a commercial enterprise operates on public properties, rather than private properties should not provide an exemption for costs which accompany the doing of business. Moreover, as a city holds the streets in trust for the public ***it would be a dereliction of a city's fiduciary duty to grant franchise rights...without receiving the fair market value for the property.***(emphasis added.)

Middletown Township presently meets its fiduciary responsibility to *physically* and *fiscally* manage its rights of way by requiring all companies which permanently occupy or use its rights of way to identify themselves to the Township and to pay a reasonable rent for such use. The only exceptions are for those companies which have permission to be in the rights of way directly from the State of Pennsylvania or from some other source.

cable television

For example, with regard to cable television companies, the Township requires each company to obtain from it a franchise to use and occupy the rights of way. This is in conformity with both federal law and the law of Pennsylvania. As to federal law, Title VI of the Communications Act specifies that a cable operator may not provide cable service without a franchise. But, in addition to the authority granted by Title VI under federal law, there is an independent basis of authority under Pennsylvania state law which requires a cable operator to obtain from the Township a franchise. Both Title VI of the federal statute as well as case law in Pennsylvania allow the Township to charge rent to a cable company for use of the Township's rights of way. Federal law caps the amount of rent which the

Township can charge to a maximum of “5 percent of such cable operator’s gross revenue derived...from the operation of the cable system to provide cable service.”

The Township has granted two cable television franchises under the authority granted to the Township under federal law and under Pennsylvania state law: one to Comcast; the other to Verizon. Each franchise requires the cable operator to pay rent for use of the rights of way in the amount of 5 percent of gross revenue derived from the provision of cable service.

Broadband – no franchise requirement

The regime for requiring a cable operator to obtain a franchise under federal law and under Pennsylvania state law arose in a much simpler time when demand for use and occupancy of the Township’s rights of way was not as intense. Because negotiation and adoption of individual franchise agreements can take several months and can be expensive, in terms of the time and money, to both the cable operator and the Township, a few years ago the Township decided to streamline the process of allowing companies to use its rights of way by taking a protocol agnostic approach and adopting a local ordinance to implement it. The ordinance applies to all users of the rights of way, not just to communications companies. For instance, the ordinance applies to electric companies, pipeline companies, and steam companies.

The local ordinance, entitled “Middletown Township Rights of Way Management Ordinance” (the “Ordinance”), recognizes that the same person or company can provide different services to residents and businesses within the Township, some of which fall within the management power of the Township and some of which services fall outside the management power of the Township.

The Ordinance divides services using the rights of way into two categories. One category speaks to services which are exempt from the Ordinance; the second category speaks to services which are non-exempt from the Ordinance. Services falling within the exempt category are largely services which are defined under Pennsylvania law to be public utilities and are regulated by the Pennsylvania Public Utility Commission. The exemptions found in the Ordinance track the language contained in the Pennsylvania state statute which allows certain specified services to have a right of entry into Township rights of way. For example, in the context of a communications public utility, the services specified by the state statute extend to:

the conveyance or transmission of messages or communications by telephone or telegraph for the public.

Thus, tracking the language of the Pennsylvania state statute, the Ordinance says:

This Rights of Way Ordinance shall not apply to occupation or use of the Public Ways to provide...

(6) The conveyance or transmission of messages or communications by telephone or telegraph for the public.

Those services using the Township's rights of way which are not regulated as a public utility by the Pennsylvania Public Utility Commission fall within the non-exempt category of the Ordinance. For example, under Pennsylvania law, the furnishing of high speed broadband is not considered to be a public utility regulated by the Pennsylvania Public Utility Commission;² and, thus, high speed broadband service falls within the non-exempt category of the Township's Ordinance.

[In addition to the services falling within the exempt category of the Ordinance, the Ordinance also does not apply to the provision of cable service because the provision of cable service is covered, as discussed above, by individual franchise agreements.]

Thus, with advent of the Ordinance, a company wishing to furnish a non-exempt service to residents or businesses in the Township can get on an expedited, streamlined path to begin furnishing its services. The Ordinance does

² There are some exceptions, none of which are pertinent to the Ordinance. For example, the PUC retains authority over high speed broadband with regard to:

- (i) the provision and administration of enhanced 911 service and nondiscriminatory enhanced 911 fees.
- (ii) telecommunications relay service fees.
- (iii) universal service fund fees.
- (iv) switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.
- (v) rates, terms or conditions of protected services provided under tariffs which are subject to approval by to approval by the Pennsylvania Public Utility Commission

not require any kind of preapproval process. A company desiring to occupy the Township's rights of way need only register with the Township by filling out a simple form called a Provider Certification and filing it with the Township. The Provider Certification, which has less than 10 questions, is designed to elicit basic identifying information about the proposed user of the rights of way, such as contact information and information which allows the Township to decide whether the service to be provided falls within the exempt category or the nonexempt category.

This streamlined process works well. An example is the proposal of ATC OUTDOOR DAS, LLC. ("ATC") to deploy a Distributed Antenna System in the Township's rights of way. On June 16, 2011, ATC submitted to the Township a Provider Certification, which is the form required by the Township's Rights of Way Management Ordinance to be submitted by anyone seeking to place facilities or equipment in the Township's rights of way. In less than 30 days of its filing the Provider Certification that company received its "road opening" permits to use and occupy the Township's rights of way for its Distributed Antenna System.

If the company falls within the exempt category, it can proceed to enter and occupy the Township's rights of way by virtue of authority granted by the State of Pennsylvania without any further permission by the Township, other than the normal "road opening" permits required of anyone seeking to open or excavate in the public way applicable even to public utilities falling within the exempt category. On the other hand, if the company falls within the nonexempt category, the company can proceed to use and occupy the Township's rights of

way immediately also without any further permission by the Township other than the normal “road opening” permits. The permission to use and occupy the Township’s rights of way granted by the Ordinance is effective as long as there is continuous compliance with the provisions of the Ordinance. For example, with regard to the *physical* management of the rights of way, the Ordinance speaks to such subjects as compliance with safety codes and insurance requirements. With regard to the *fiscal* management of the rights of way, the Ordinance speaks to a rent payment to be made to the Township for use of its rights of way. The rent which must be paid is 5 percent of gross revenue derived from the use of the Township’s rights of way for the provision of the nonexempt service to persons having a residence or place of business in the Township.

No Discriminatory Treatment By Township

One of the topics upon which the NOI is centered is the issue of discriminatory/differential treatment.

As may be seen from the above discussion of how the Township approaches management of its rights of way, the Township does not discriminate amongst users of its rights of way. To the extent allowed by Pennsylvania law, the Township’s Rights of Way Management Ordinance treats all users of its rights of way equally. It applies generally to any user – whether it be an electric company, a pipeline company, a steam company, or a communications company. If such company has authority to occupy Township rights of way by virtue of

Pennsylvania state law to furnish a particular service, then an exemption will apply. On the other hand, no matter what the use, if the company is not providing a service by which it has authority to occupy Township rights of way by virtue of Pennsylvania state law, it is not exempt.

Reasonable Rental Requirement

There is no discriminatory treatment when it comes to the rent payment requirement; and, the rent payment required of the Ordinance is reasonable.

All nonexempt services must pay the same rent. The benchmark for the rent is borrowed from the federal Communications Act, which sets the maximum franchise fee which the Township can charge for cable service to be 5 percent. In order to treat all service providers equally, the Township's two cable service franchises each require the cable service provider to pay rent of 5 percent of gross revenue and the Ordinance, likewise, requires companies which use the rights of way to furnish noncable services falling in the nonexempt category also to pay a fee of 5 percent of the gross revenue. It is important to note, as well, the amount of gross revenue to be included in this calculation is only the amount derived from the use of the Township's rights of way for the provision of the nonexempt service to persons having a residence or place of business in the Township.

A rental based upon a percentage of gross revenue is quite reasonable because it allows for innovation and encourages companies to furnish new

services. If a company launches a new, innovative service which does not earn much revenue right away, such company is not saddled with a fixed overhead cost to furnish its service. Instead, it only incurs a variable cost. It need only pay an increased rental as it earns more revenue and is financially able to shoulder the amount of the increased rental.

Public Policy Goals

The public policy goal behind enactment of the Township's Rights of Way Management Ordinance is proper management of the Township's rights of way. As discussed above in these Comments, proper management of the rights of way includes the rapid deployment of broadband. That is why the Township enacted a streamlined process which allows broadband providers to quickly use and occupy the Township's rights of way without the necessity of negotiating individual agreements. As explained above in these Comments, the Township's procedure works well, as illustrated by the fact that ATC Outdoor DAS, LLC complied with the requirements of the Ordinance and obtained access to use and occupy the Township's rights of way in less than 30 days.

But, in addition, proper management of the Township's rights of way includes both the *physical* management of the rights of way *and* the *fiscal* management of the rights of way.

In addition to the admonition of the federal court quoted above in these Comments to the effect that “it would be a dereliction of a city’s fiduciary duty to grant franchise rights...without receiving the fair market value for the property.”, it has long been the law in Pennsylvania that in a situation wherein a municipality has the right to consent or to withhold consent to a private company’s use and occupancy of a municipality’s rights of way, such municipality can charge rent to that private company for use of those rights of way. In a case dating back to 1893, the Pennsylvania Supreme Court had occasion to decide if a city had the right to condition its consent to use of its rights upon payment of rent to the city. In affirming the city’s right to do so, the court opined:

A valuable franchise, to use public property, the streets, for corporate profit, is about to be granted. It is not illegal or unreasonable that the public, or the city which represents it, should have a consideration for the privilege that it confers. If it were a right of passage over private property, there would be no questions about it, and the right could not be got in any other way. We see no reason why the public interest should not be promoted by requiring special privileges in the public property to be paid for in the same way.

In the same year, the United State’s Supreme Court issued its decision in City of St. Louis v. Western Union Telegraph Co., 148 U.S.92 (1893). In that case, the City of St. Louis had passed an ordinance which charged the Western Union Telegraph Co. for use of the city’s streets. The court upheld the ordinance and said,

Clearly, this is no privilege or license tax...It is more in the nature of a charge for the use of property belonging to the city – that which may properly be called **rental**.

• • •

The revenues of a municipality may come from **rentals** as legitimately and as properly as from taxes. (emphasis added)

In 1939, the Pennsylvania Supreme Court, again, had occasion to examine a rental requirement imposed upon a private company's use of municipal rights of way. In that case, the City of Philadelphia adopted an ordinance granting its consent to a private company to place wires under the streets of the city for use in its business operations. The ordinance required the private company to pay a rental to the city calculated as a percentage of the private company's yearly gross receipts. The city filed an action to collect the rent. In affirming the lower court's money judgment in favor of the city, the Pennsylvania Supreme Court held as follows:

As a consideration for permitting it to operate underground wires in the streets the City could exact whatever payments in the nature of rentals it might deem proper. . . .

. . . .

But the consideration exacted in the ordinance is **neither a tax nor a license fee**; it is in the nature of an **annual rental** to be paid for the privilege of the use of space under the streets. . . . (emphasis added).

Thus, by adopting the Rights of Way Management Ordinance containing a reasonable rental requirement, the Township fosters the important public policy goal of fiscal solvency while at the same time fosters the important public policy goal of the rapid deployment of broadband.

FCC Has No Legal Authority for Rulemaking

The FCC has no legal authority to engage in rulemaking to upset or otherwise regulate the Township's management of its own rights of way.

In the NOI, the FCC points to three statutory provisions as grounds for its legal authority- Section 706, Section 253, and Section 332(c)(7) – but none of these provisions allows the FCC to upset or otherwise regulate the Township's physical and fiscal management of its rights of way.

Section 706 (otherwise known at 47 USC §1302(a)) says the following:

- (a) In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, **in a manner consistent with the public interest, convenience, and necessity**, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. (emphasis added).

This statutory provision expresses the worthwhile goal of encouraging the rapid deployment of broadband, but says that the Commission may take action only “in a manner consistent with the public interest, convenience, and necessity.” This limitation means that the Commission must take into account the public policy goals of the Township. Those public policy goals include not only the rapid deployment of broadband but the physical and fiscal management of its rights of way. Section 706 does not allow the Commission to substitute its own views for that of the Township which is charged under state law with management of its

own rights of way. Surely, the public interest, convenience and necessity would not be served if the Commission were to restrict Township in the manner that it manages its rights of way with the consequence that the Township may have to reduce the number of its police and public works employees.

But, yet there is another reason why Section 706 is no legal ground for upsetting or otherwise regulating the Township's management of its own rights of way. As clearly articulated by the United States Supreme Court in City of St. Louis v. Western Union Telegraph Co., 148 U.S.92 (1893), even though a federal law may intend to rapidly deploy a new communications technology across the country, "It is a misconception, however, to suppose that [it] carries with it the unrestricted right to appropriate the public property of a State....it cannot abridge any property rights of a public character created by the authority of another sovereignty." The Supreme Court went on to explain:

This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation.

With regard to Section 253 (47 USC §253), Section 253 also is not a source of legal authority. This is because Section 253 is a Title II provision. Title II concerns Telecommunications Service; and, there is clear and well-founded legal precedent placing high speed broadband outside the bounds of

Telecommunications Service. High speed broadband is an Information Service, not covered by Section 253.

And, finally, with regard to Section 332(c)(7) (47 USC §332(c)(7)), that section applies to rights of way issues concerning wireless services. Notably, that provision preserves local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities, provided the local government “does not prohibit or have the effect of prohibiting the provision of personal wireless services.” However, this section only endorses the right of the Township to manage its rights of way and otherwise has no applicability to the Township’s situation because the Township’s Rights of Way Management Ordinance *allows* users into the rights of way; it does not prohibit them.

In addition to the absence of any statutory authority to upset or regulate the Township’s management of its rights of way, the FCC may not do so because any such action by the FCC would be unconstitutional. The Tenth Amendment to the Constitution says:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

As noted earlier in these Comments, the power of the Township to manage its own rights of way under Pennsylvania state law has been consistent and clear for a period of time beginning almost 100 years before the time of the Constitution and never was delegated to the United States, nor is such power prohibited by the Constitution. Thus, management of Middletown Township’s own local rights of

way is a matter of Pennsylvania state law, not one to be messed with by the Federal Communications Commission.

FCC Has Limited Legal Authority to Engage in Educational Programs

The Commission can not do indirectly what it can not do directly. The FCC certainly has the legal authority to engage in educational programs, but those educational programs can not suggest avenues or advocate ways to impair or otherwise undermine the authority of the Township to manage its rights of way in an unfettered manner.

Uniformity

The NOI asks for the Township's views on uniformity.

With regard to uniformity, the Township is of the view that it favors the rapid nationwide deployment of broadband, but in the rush to deploy broadband, it will be difficult or impossible for one federal agency to uniformly promulgate rules or procedures which will be appropriate to a multitude of individual situations prevailing in 50 states, not to mention the individual and particular situations prevailing in thousands of local government jurisdictions within those states.

Middletown Township has adopted and put into effect an approach which it believes fits its particular situation. Township is confident that it knows and

understands the particular needs and public policy goals of its residents. Each year these needs and goals are reflected in a budget of how the Township decides to spend its limited resources. Management of the rights of way not only encompasses expense considerations but revenue considerations, as well. Deriving revenue from private companies which place their equipment and facilities in the public rights of way in the form of rent is important to the Township. In other townships and locales, this may be of less importance.

All of these considerations are local centric. That is why the State of Pennsylvania does not manage the Township's rights of way on a state level. Rather, the state delegates to the Township the authority to manage its own rights of way because it is the Township which best can balance its various competing interests, decide how to budget its resources, and manage its own rights of way.

The Township submits that other townships and local governments around the country also know their own needs best. What may make sense to a local government in suburban Philadelphia may not make sense to a local government in a rural part of Wyoming – or even to a local government in a rural part of Pennsylvania. It is not feasible for the Federal Communications Commission to know the individual and particular rights of way management needs of each local government across the country, and certainly not possible for it to have the same depth of understanding about those needs as the elected officials in each of those local governments.

Conclusion

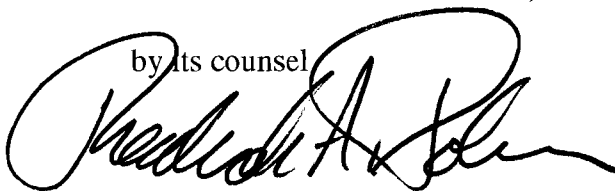
Middletown Township had adopted an approach to management of its rights of way which encourages the rapid deployment of broadband and does so in a manner which safeguards the public and is fiscally responsible. The legal authority to proceed in the fashion chosen by the Township stems back to a time before the founding of the United States and has been consistent and well founded throughout all these years.

The Federal Communications Commission does not have the legal right to upset or regulate the Township's management of its local rights of way or to impair the Township's authority to do so.

Respectfully submitted,

MIDDLETOWN TOWNSHIP, Pa.

by its counsel

A handwritten signature in black ink, appearing to read 'Frederick A. Polner', written over the text 'by its counsel'.

Frederick A. Polner, Esq.

Frederick A. Polner, Esq.
POLNER LAW OFFICE
4018 Mt. Royal Blvd.
Allison Park, PA 15101

412-486-3540

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